Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF RYE, NEW YORK; TOWN OF NORTH CASTLE, NEW YORK; CITY OF RYE, NEW YORK; TOWN/VILLAGE OF HARRISON, NEW YORK; TOWN OF NEW CASTLE, NEW YORK; TOWN OF MT. PLEASANT, NEW YORK; TOWN OF GREENWICH, CONNECTICUT; AIR CONSERVATION TRUST, INC.; AIRPORT CONCERN TEAM, INC.; WESTCHESTER COALITION TO LIMIT AIRPORT EXPANSION, INC.,

Petitioners,

—against—

SAMUEL K. SKINNER, Secretary of Transportation; JAMES B. BUSEY, Administrator, Federal Aviation Administration; THE FEDERAL AVIATION ADMINISTRATION; DANIEL J. PETERSON, Regional Administrator, Federal Aviation Administration; WILLIAM HANDEL, Manager Airports Division, Federal Aviation Administration; COUNTY OF WESTCHESTER, NEW YORK; ANDREW P. O'ROURKE, County Executive for the County of Westchester, New York; WESTCHESTER COUNTY BOARD OF LEGISLATORS; WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION,

Respondents.

BRIEF OF WESTCHESTER COUNTY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration (FAA) procedurally complied with the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq, the Regulations of the Council on Environmental Quality (CEQ regs), 40 C.F.R. Part 1500 and FAA Order No. 5050.4A (5050) concerning public involvement, before issuing the Record of Decision (ROD), Finding of No Significant Impact (FONSI) and Airport Layout Plan (ALP) regarding the proposed fourteen (14) items of improvement for the Westchester County Airport, when the FAA and Westchester County conducted public hearings and received written comments on every draft environmental assessment (EA); the FAA circulated for comment its Preliminary Analysis

(PA) of the EA; and the FAA's further independent analysis of October 1989 pertaining to terminal capacity/use itself was done in direct response to each of the previous comments generated by the Petitioners?

2. Whether the FAA's issuance of the FONSI based on the EA of the Westchester County Airport project improvements was arbitrary and capricious?

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CITATIONS OF OPINION BELOW

Westchester County Respondents accept the Petitioners' citation of the opinion below which is reproduced in the Appendix to the Petition for Certiorari.

The unreported administrative opinions of the FAA, the Record of Decision (ROD) dated November 30, 1989, the Finding of No Significant Impact (FONSI) dated November 30, 1989 and the Airport Layout Plan (ALP) dated February 28, 1990 are reproduced in the Appendix to the Petition for Certiorari.

STATEMENT OF THE CASE

Westchester County Airport, located in Westchester County, New York, was constructed under the auspices of the Federal government in the early 1940's as an air defense satellite base for New York City and was turned over to the County in 1943. Throughout the years, the Airport has developed into primarily a general aviation facility; there is a limited amount of air carrier and commuter activity, serving mainly residents and business travelers in Westchester and Fairfield, Connecticut counties. The present passenger terminal, a surplus military shed, a Quonset hut brought from Guam in 1946, has a total floor area of 10,000 square feet which serves air carriers,

commuter airlines and is undisputably in dire need of replacement.

Since the 1970's, the County of Westchester has undertaken comprehensive studies to increase the safety, efficiency and utility of the the Airport. In 1980, a proposed Master Plan study for the Airport was published; the emphasis of the plan was improving facilities for existing users, including the construction of a new terminal. Following its publication, the County began a study of the environmental impact of the proposed items of improvement, and at the request of the FAA, commenced an EA pursuant to NEPA on the ALP; the County voluntarily expanded the NEPA EA to fulfill the requirements of a Generic Environmental Impact Statement

(GEIS) under New York State law's more stringent standards set forth in the New York State Environmental Quality Act, (SEQRA), Environmental Conservation Law §§8-0101 et seq and its regulations contained in 6 New York Code Rules and Regulations (N.Y.C.R.R.) Part 617.

After a series of self-imposed contractual constraints instituted by the County from 1983-85, including the Midway Case Stipulation, the later Terminal Capacity Agreement, and the Statement of Airport Policy by the Westchester County Board of Legislators, limiting the amount of passengers at the terminal to 240 passengers each half hour, work commenced on an update of the ALP and Master Plan.

In October 1986, a Draft Master Plan Update report and detailed Draft EA/EIS were published and circulated setting forth the proposed action of 14 items of improvement for the Airport, including a new passenger terminal parking facilities, and airport perimeter road and their associated environmental effects were analyzed. The documents were the subject of intensive public scrutiny and evaluation, including a public hearing and extended comment period.

In February 1988, the final EA/GEIS of the Airport was issued and distributed to all interested agencies, entities and persons under State and Federal law. The County also agreed to conduct a project site specific environmental review of the Terminal

Project, as a supplement to the EA/GEIS. Subsequently, a Draft EA/EIS was issued and distributed in August 1988, containing more specific detail on the passenger terminal, associated parking structure, relocated access roads and rental car facilities. A public hearing was conducted on the Draft EA/EIS and an extensive public comment period was afforded to all who wished to participate.

Consequently, a supplemental EA/FEIS was completed and circulated to State and County officials and all other interested agencies, entities and persons for comment in November 1988. In the EA, notwithstanding the County's firm commitment to limiting the capacity of the Terminal to 480 passengers per hour, additional

analysis was conducted without those constraints using a "worst case" scenario.

Furthermore, the FAA issued in March 1989 a detailed and thorough Preliminary Analysis (PA) of the County's EA and voluntarily provided a 30 day period for public comment as an extra step in the review process.

Prior to issuing the ROD and FONSI on November 30, 1989, the FAA further reviewed and considered each comment posed by the public of its PA and provided further independent analysis regarding terminal capacity/use, the October 1989 Analysis (OA), which the FAA incorporated in the FONSI.

In addition to fully and meticulously addressing terminal capacity/use, the FONSI thoroughly reviewed and summarized each of the project areas of concern -- including noise, compatibility and use, vehicular traffic, terminal size and location, terminal ramp area, airport capacity, air and water quality, social/economic impacts public hearing/ comments and mitigation measures.

By letter dated February 28, 1990 addressed to Westchester County Executive Andrew P. O'Rourke, the FAA issued an approval of the Westchester County Airport Layout Plan (ALP), a map reflecting the proposed projects.

The Decision of the Second Circuit

On January 24, 1990 and March 19, 1990, respectively, the Petitioners, municipalities and citizens groups in the vicinity of the Airport, filed petitions for review pursuant to 49 U.S.C. §1486 of two orders of the FAA, the ROD and FONSI issued on November 30, 1989 and the Airport Layout Plan (ALP) approval issued on February 28, 1990.

The Petitioners raised the following contentions on appeal to the United States Court of Appeals for the Second Circuit: (1) the issues before the Court were not ripe for review; (2) the FAA violated NEPA by failing to circulate for public comment its independent analysis of the likelihood

that a new terminal will result in increased Airport use; (3) the required State and local review process never took place; (4) the FAA acted arbitrarily and capriciously in issuing the FONSI and ROD by not requiring a full environmental impact statement (EIS); (5) the FAA failed to give adequate consideration to the cumulative impact of the Airport project; and (6) the public controversy surrounding it and (7) available alternatives.

The Court of Appeals for the Second Circuit denied the petitions for review. Town of Rye v. Skinner, 907 F.2d 23 (2d.Cir.1990). In so ruling, the Court of Appeals rejected each of the claims and contentions specifically raised by Petitioners in

their appeal. In particular, the Court found to be without merit, Petitioners' claim that the FAA violated NEPA by failing to circulate for public comment its independent analysis of the likelihood that a new terminal will result in increased Airport use. To the contrary, the Second Circuit concluded that "[W]hile NEPA and the regulations promulgated under it encourage public involvement in the preparation of environmental assessments, the FAA more than complied with this requirement," by conducting public hearing and receiving comments on every draft environmental assessment and circulating for comments its PA of the EA. Moreover, the Second Circuit further acknowledged that FAA's independent analysis of October 1989

itself was done in response to comments of the Petitioners.

SUMMARY OF ARGUMENT

This case is not of special importance and the United States Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits.

Essentially unraised below, Petitioners may not argue an illusory theory of the principles of fundamental fairness concerning public involvement in the NEPA process in this Court. Moreover, Petitioners' contentions with respect to requiring more stringent standards for Federal Aviation Administration (FAA) regulations governing public participation in environmental reviews of Airport Projects are best addressed to Congress.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review

Petitioners assert that the United States Court of Appeals for the Second Circuit erroneously rejected its claim that the FAA's failure to circulate the October 1989 Analysis for public comment violated NEPA.

This Court, however, has never regarded its function as simply correcting a legal error perceived by disappointed litigants in a lower Court decision. To the extent Petitioners seek clarification or a change of Federal statutory law or Federal agency regulations or rules, that role is best left to Congress.

As recognized by the Second Circuit's opinion, Petitioners here asserted public participation requirements for environmental review which are beyond the purview of NEPA. The Second Circuit drew upon previous opinions in Hanly v. Kleindienst, 471 F.2d 823 (2d Cir.1972) cert denied, 412 U.S. 908 (1973), Town of Orangetown v. Gorsuch, 718 F.2d 29(2d Cir.1983) cert denied, 465 U.S. 1099 (1984) and City of New York v. United States Department of Transportation, 715 F.2d 732 (2d Cir. 1983) cert denied and app dismd, 465 U.S. 1055 (1984) in support of its analysis.

Nor does the plain language of the regulations, rules and orders of the FAA support Petitioners' arguments.

Regulations of the Council on Environmental Quality (CEQ regs), 40 C.F.R. Part 1500; FAA Order No. 5050.4A.

Moreover, as the Second Circuit observed, the FAA's consideration of public controversy was apparent since the Airport project is categorically excluded from environmental review (see FAA Order 5050.4A §§20(b), 23(a)(4)). Notwithstanding the exclusion, the FAA had nevertheless, decided to prepare an environmental assessment in recognition of community opposition to the project. Town of Rye v. Skinner, 907 F.2d at 25.

B. No violation of the general principle of fundamental fairness by the FAA was specifically raised by Petitioners below

In a belated attempt to introduce a new theory for challenging the Second Circuit's decision denying their petitions for review, Petitioners for the first time now raise the purported claim that the FAA violated general principles of fundamental fairness set forth by the dictum of Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 288, n.4 (1974) by failing to circulate for further public comment its independent analysis of the likelihood that a new terminal will result in increased Airport use.

No such legal claim or theory premised on this Court's dictum in Bowman was specifically asserted by the Petitioners below and thus was not addressed by the Court of Appeal's decision.

This Court has held that it will not address a contention or theory not raised in the Court of Appeals and not addressed by that court. Rogers v. Lodge, 458 U.S. 613 (1982) reh den, 459 U.S. 899 (1982). Nor will this Court consider the merits of a claim or theory upon which the Court of Appeals, in view of the disposition of the case, did not pass. Calmar S.S. Corp. v. United States, 345 U.S. 446 (1953).

Accordingly, since Petitioners did not raise or rely upon the general principles of fundamental fairness theory below and the Second Circuit consequently had no opportunity to pass upon the applicability of such a theory, any such contention is now foreclosed as untimely for assertion in this Court.

C. There is no conflict between the Court of Appeals decision below and decisions of this Court

Even assuming arguendo, this Court should somehow entertain Petitioners' newly raised fundamental fairness principles contention, contrary to Petitioners' suggestions, there is no conflict between the decision of the Court of Appeals for the Second Circuit and the dictum of this Court in Bowman Transportation, Inc.v. Arkansas-Best Freight System, Inc., 419 U.S. 218 (1974).

Bowman is clearly inapposite as that case concerned the due process rights of parties to a formal adjudication by the Interstate Commerce Commission, pursuant to the trial-type procedures set forth in the Administrative Procedure Act, 5 U.S.C.

§§554, 556-557, a situation not presented here.

Nor is there obviously any conflict between the Second Circuit's disposition and Pension Benefit Guaranty v. LTV Corp., _U.S._, 110 S.Ct. 2668 (1990) and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). In each of these cases, this Court has held that unless the Administrative Procedure Act, the plain language of agency statutes or regulations, or constitutional due process provides otherwise, courts may not impose additional procedures on agencies, notwithstanding the principles of fundamental fairness.

The FAA here, as the Second Circuit concluded, more than complied with NEPA, the regulations promulgated under it and the FAA's own order, in terms of encouraging public involvement in environmental assessments.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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GLOSSARY OF ACRONYMS

ALP - Airport Layout Plan

CEQ - Council on Environmental Quality

EA - Environmental Assessment

EIS - Environmental Impact Statement

EPA - Environmental Protection Agency

FAA - Federal Aviation Administration

FEIS - Final Environmental Impact Statement

FONSI - Finding of No Significant Impact

GEIS - Generic Environmental Impact Statement

NEPA - National Environmental Policy Act

OA - October 1989 Analysis-Demand, Capacity and Operational Analysis of Westchester County Airport

PA - Preliminary Analysis

ROD - Record of Decision

SEQRA - State Environmental Quality Review Act